Section 173 of the Criminal Procedure Code enacts that:

> "For every distinct offence of which any person is accused, there shall be a separate charge and every such charge shall be tried separately except in the cases mentioned in sections 174, 175, 176 and 179."

The joining of a charge of using counterfeit notes on the 9th of April with a charge of escaping from police custody on the 10th of April is not allowed under any of the four sections mentioned in s. 173. The joinder was therefore illegal and cannot be overlooked under s. 448.

> "The remedying of mere irregularities is familiar in most systems of jurisprudence, but it would be extraordinary extension of such a branch of administering the criminal law to say that when the Code positively enacts that such a trial as that which has taken place here shall not be permitted that the contravention of the Code comes within the description of error, omission or irregularity."

Subramania Iyer v. *King Emperor*, L.R. 28 Ind. App. at p. 263, I.L.R. 25 Mad. 61: *Raman Behari Das* v. *Emperor*, I.L.R. 41 Cal. 722. *Krishnaji Anant Dange* v. *Emperor*, A.I.R. (1932) Bom. 277. *Muthusami Pillai* v. *Government Tahsildar of Ramnand*, A.I.R. (1933) Mad. 434.

It was suggested by Mr. Butterfield that as the second charge was not put to the jury in the summing-up and as no verdict was given on this charge and as it was withdrawn by the Crown Counsel who prosecuted, there was no misjoinder. In view, however, of the decision of the Judicial Committee in *Choukhani* v. *King Emperor*, 54 T.L.R. 454 that the time for ascertaining whether or not there is misjoinder is at the time when the accusation is made and not when the trial was concluded Mr. Butterfield's suggestion is untenable.

It is immaterial that the misjoinder did not prejudice the appellant as the evidence of escape from custody could have been given as part of the evidence to substantiate the first charge. Evidence Ordinance, s. 8. *Rex* v. *Ellis*, 5 Cr. App. Rep. at pp. 53 and 54 (1910) 2 K.B. 746.

As the law stands the misjoinder vitiates the conviction.

It is apparent from the passage quoted from *Subramania Iyer's* case that misjoinder is not an irregularity and that the provision added to s. 6 sub-s. 2 of the Court of Criminal Appeal Ordinance by the Court of Criminal Appeal (Amendment) Ordinance 1937 does not empower this Court to order a new trial.

The conviction is quashed.

Appeal allowed.

[COURT OF CRIMINAL APPEAL]

McELWAINE, C.J., TERRELL & HORNE, JJ.

July 29, 1938.

REX v. UIN LIAT.

[PENANG CRIMINAL APPEAL No. 21 of 1938]

The Evidence Ordinance (Cap. 13), s. 134 —Uncorroborated evidence of accomplice—Misdirection.

In a criminal trial the jury must be adequately warned about the danger of convicting on the uncorroborated evidence of an accomplice. When the Court of Appeal is satisfied that a material point has been clearly impressed upon the jury by counsel that the jury must have the matter correctly before them, an omission in the summing up can properly be overlooked. But this does not apply to a serious misdirection as distinct from non-direction.

CRIMINAL APPEAL.

Appellant in person.

Howe, Crown Counsel for Crown.

The facts and arguments appear sufficiently from the judgment.

Cur. Ad. Vult.

The judgment of the Court of Criminal Appeal (**McELWAINE, C.J., TERRELL & HORNE, JJ.**) was delivered by—

McELWAINE, C.J.—The accused appeals against his conviction on a retrial of a charge of trafficking in forged currency notes at Penang on 24th August 1937.

A large volume of evidence was adduced with a view to proving trafficking by other persons who have already been convicted.

A police inspector Kay who posed as the would be purchaser of the notes insisted on taking delivery at Tong Lok Hotel which was being watched by other police who raided the premises on a prearranged signal from Inspector Kay when the accused and others were arrested.

Apart from the evidence of a convicted accomplice Boo Bun Chin, the only evidence implicating the accused was the undenied fact that he arrived at 4.30 p.m. at the Hotel accompanied by Boo Bun Chin and carrying a cardboard box which admittedly came from accused's shop and which was full of counterfeit notes.

He placed the box on a table at which were seated Inspector Kay and a Japanese with whom Inspector Kay had been negotiating for the sale of the notes. Appellant then left the room.

The appellant appears to have carried on in conjunction with other activities the business of a vendor of scrap iron, and his evidence was that he negotiated with Boo Bun Chin about a sale of scrap iron to a Japanese and that it was for this purpose that he accompanied Boo Bun Chin to the Hotel.

The only real question in issue was the guilty knowledge of the appellant. Had the case stopped there, the jury might or might not have had a reasonable doubt of his guilt.

The importance of Boo Bun Chin's evidence was that if it was believed the appellant's guilty knowledge was amply established.

During the negotiations which preceded the appearance of the appellant upon the scene, Boo Bun Chin had attempted to persuade Inspector Kay to take delivery of the notes on some country road, saying that the Chinese owner of the notes was afraid to give delivery at the Hotel.

Untainted Crown witnesses gave evidence to the same effect, but their information was based on Boo Bun Chin's statement.

It is therefore possible that it was Boo Bun Chin himself who feared to deliver at the Hotel and that he represented that the fears were those of an unknown Chinese whom he could not persuade to come to the Hotel as an inducement to Inspector Kay to take delivery elsewhere. The inference which has been drawn in the case is that there was such an unknown Chinese owner and that the appellant subsequently disclosed himself as the anonymous Chinese.

In order to rebut the appellant's defence (which had been disclosed at the earlier trial) the Crown called Boo Bun Chin.

This man had already been convicted as one of the traffickers.

At the retrial of the appellant Boo Bun Chin denied the story of the scrap iron and freely admitted his own complicity in the crime.

The only point which we have to consider is whether the jury was adequately warned of the desirability of the accomplice's evidence being corroborated, or whether there was in fact clear and convincing corroboration which would justify this Court in overlooking any inadequacy in the charge to the jury if we thought the charge inadequate. Mr. Howe very properly drew our attention to the recent case of *Thomas Lewis*, 26 C.A.R. 110 that there had been no direction as to the danger of convicting on uncorroborated evidence of accomplices. There, the Court of Criminal Appeal said:

> "That there was corroborative evidence is manifest, proceeding from the lips of the appellant himself. One might even go further, and say that there was strong corroborative evidence, which the jury might well have thought sufficient corroboration of the evidence of Sansun and Wassell. But that is not enough. The question is, was there corroborative evidence so cogent and convincing that the conclusion is not to be resisted that the jury, properly directed, would certainly have arrived at the same conclusion? In the opinion of this Court, the evidence in this case is not so strong as to entitle us to say that the jury must inevitably have come to the same conclusion if they had been properly directed. In these circumstances this Court is bound to allow the appeal and to quash that conviction."

Under s. 134 of the Evidence Ordinance, a conviction is not illegal even if it proceeds upon the uncorroborated evidence of an accomplice, but the Courts of the Colony follow the English law in requiring the jury to be warned of the danger of convicting upon such uncorroborated evidence.

Counsel for the appellant at his trial drew the attention of the jury to the point that an accomplice's evidence should be corroborated and he quoted passages from *Rex* v. *Baskerville*, (1916) 2 K.B. 658.

The Crown Counsel who conducted the prosecution also referred to the question of corroboration but he did so in a rather peculiar manner. Having read s. 134 of the Evidence Ordinance he proceeded "But, Gentlemen, in these Courts, the rule of practice, though not the rule of law, is, as has been pointed out to you by my learned friend in the case that he mentioned, that a person should not be convicted on the uncorroborated evidence of an accomplice. But, gentlemen, this is not the case here. These accused (they were actually convicted) persons have merely been called to give corroboration to the independent evidence which has been submitted to you." This is rather an inverted way of putting it. It by no means follows that if a tainted witness corroborated an untainted witness, the untainted witness necessarily corroborates the tainted witness in some material particular implicating the accused.

When this Court is satisfied that a material point has been clearly impressed upon the jury by counsel that the jury must have the matter correctly before them, an omission in the summing up can properly be over-looked. *Rex* v. *Beecham*, (1920) K.B. But this does not apply to a serious misdirection as distinct from non-direction.

In his summing up the learned trial judge directed the jury in the following words: "The other question of law is this matter of the evidence of accomplices. That has been explained to you already by both sides as to the necessity or the advisability in these Courts of accepting the evidence of accomplices without being corroborated. But as has been pointed out by Crown Counsel, this case for the prosecution does not rest on the evidence of accomplices. They have been called only to substantiate evidence which was not evidence of accomplices. That is to say you have the clear evidence of Inspector Kay and the other people who were in that room on the 24th August last." Then he refers to the arrival of the accused with the box of notes.

Now "the clear evidence of Inspector Kay and the other people" on the guilty knowledge of the accused was not "so cogent and convincing that the conclusion is not to be resisted that the jury properly directed, would certainly have arrived at the same conclusion." Had the jury been directed to consider the undisputed evidence that the accused walked into that room with a box of forged notes, and then to consider his explanation, and the fact that he left the room without payment for the notes he had delivered they might have found guilty possession or they might not.

Apart from Boo Bun Chin's evidence, the evidence of guilty knowledge is not overwhelming.

That being so we think the summing up and the speech of counsel for the Crown may well have undermined whatever weight the speech of counsel for the defence may have had, by leading the jury to think that what was required was not so much that a man admittedly not only was an accomplice but an accomplice who had either at his trial or at the accused's trial lied to the Court should be corroborated, but that he should corroborate perfectly honest witnesses on points upon which there was no dispute.

We are of opinion that the jury was not adequately warned about the danger of convicting on the uncorroborated evidence of an accomplice. We are further of opinion that if there was any corroboration of the vital point of guilty knowledge, it was put far too strongly in referring to "the clear evidence" which was not incompatible with the accused's defence.

We have already stated that whatever corroboration there may have been was not so cogent and convincing as to cure the defect to which we have referred in an otherwise admirable summing up.

We therefore allow the appeal and quash the conviction.

Appeal allowed.

Conviction quashed.

[ORIGINAL CIVIL JURISDICTION]

McELWAINE, C.J.

October 5, 1938.

RE M. P. L. M. MUTHIAH CHETTIAR. *EX PARTE* S. P. N. RAMANATHAN CHETTIAR.

[MALACCA BANKRUPTCY No. 44 of 1938]

Bankruptcy Notice—Bankruptcy Rules 2, 9, 93 and 97.

The copy of a bankruptcy notice for service upon the debtor must be sealed with the seal of the Supreme Court. If it is not sealed with the seal of the Supreme Court the omission is not a mere formal defect, but it renders the service upon the debtor a nullity and being a material defect the Court has no power to waive it.

MOTION.

John Laycock for petitioning creditor.

R. L. Eber for debtor.

The facts and arguments appear sufficiently from the judgment.

Cur. Ad. Vult.

McELWAINE, C.J.—The proceedings on this bankruptcy petition were transferred from Malacca to Singapore by an order of Horne J.

The petition alleges as the act of bankruptcy the failure of M. P. L. M. Muthia Chettiar "to comply with the requirements of a bankruptcy notice duly served on him on 15th June 1938."

The petition is opposed on the ground that a bankruptcy notice was not duly served, because the copy of the notice delivered to M. B. L. M. Muthiah Chettiar by the process server to the Sheriff of the High Court Malacca did not bear the seal of the Supreme Court of the Straits Settlements.

I think it important to set out the process server's affidavit.

> "1. I did on Wednesday the 15th day of June, 1938 at 3.25 p.m. at No. 65 First Cross Street, Malacca, serve M. P. L. M. Muthiah Chettiar with a copy of the Bankruptcy Notice dated the 15th day of June, 1938 by exhibiting the original and delivering a copy thereof to him.
>
> 2. The said M. P. L. M. Muthiah Chettiar was pointed out to me by Tay Peck Lee clerk to Messrs. Allen & Gledhill Solicitors for the Petitioning Creditor.
>
> 3. The sealed copy of the said bankruptcy notice is now produced and shown to me and marked "A."
>
> 4. That I did afterwards on the same day endorse on the sealed copy of the said Bankruptcy Notice the day of the week and month of such service on the said M. P. L. M. Muthiah Chettiar personally."

The sealed notice is a carbon copy signed by the Registrar on 15th June, 1938.

The flaw alleged in these proceedings is that the copy of the bankruptcy notice served on or delivered to M. P. L. M. Muthiah Chettiar did not bear the seal of the Supreme Court of the Straits Settlements but bore instead a rubber stamp (L.S.)

The Deputy Registrar of the High Court at Malacca has in an affidavit set out the Malacca practice as follows:—

> "So far as I am aware the practice with regard to the above has been as follows until quite recently. The Solicitor for the petitioning creditor through his Court clerk (as required by rule 93 of the Bankruptcy Rules) hands over to the Registry clerks four copies of the